Supreme Court of the United States

JUNE TERM, 1950

No. 812

F. H. VAHLSING, *Petitioner*

v.

F. O. HARRELL, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, F. O. Harrell, in opposition to the petition for a Writ of Certiorari, respectfully shows this Honorable Court:

The petition should be denied because it raises no novel question of law. The case does not involve any substantial or disputed federal question, nor does it affect the public interest or national welfare. The adjudication of the District Court of the United States for the Southern District of Texas and the Court of Appeals for the Fifth Circuit that the Petitioner, F. H.

Vahlsing, was without the right to construct, have or maintain a suction pipe across the land of Respondent without the consent of Respondent, is not inconsistent with the decisions of this Honorable Court or with the decisions of the Courts of Appeal in other circuits.

STATEMENT OF THE CASE

The Court of Appeals in its opinion, as officially reported in 178 Fed. (2nd) 622, has stated the facts of the case with clarity and conciseness. Petitioner has not directly challenged this statement of facts, and Respondent adopts the statement as set forth in that opinion in so far as it goes, adding a few additional facts from the record in the discussion under subparagraph "C," infra.

POINT I.

The Court of Appeals properly affirmed the adjudication on the merits.

A. The Grant of Easement, If Any, In Favor of the Water District, is Confined to Drainage Purposes Only.

Petitioner has challenged the adjudication of the District Court for the Southern District of Texas holding, in effect, that the evidence did not reflect that the La Feria Water Control and Improvement District, Cameron County No. 3 had an easement to have or maintain suction pipes for irrigation upon the land of Respondent, despite the fact that an easement for drainage had been granted to the District by Respond-

ent's predecessor in title. Since Petitioner claims no rights upon the land of Respondent except through the District, and the District's easement did not include this particular privilege, the District Court held that Petitioner had no right to maintain the suction pipes at the place in question without Respondent's consent. This adjudication was affirmed upon appeal.

Respondent insists that the District Court was correct in its holding, under the facts. The only evidence of a grant in favor of the District to use the land of Respondent were two letters, each executed in the year 1934, in which one Amthor, Engineer for the District, made inquiry of Respondent's predecessor and title and requested "a contract or an easement deed for drainage right of way." A reply was received stating "we will accept your proposition as outlined in your letter." No contract or easement deed for a drainage right of way was subsequently executed (p. 122), but none-the-less the District, in 1935, did within the metes and bounds described in Amthor's letter (p. 116-117) construct a drainage ditch. The ditch itself was constructed entirely within Respondent's land at the points in question (p. 27-28, 139 Req. 35), and was used by the District thereafter solely for the purpose of maintaining and repairing a drainage ditch and for soil disposal, never being used by the District for the purpose of constructing or maintaining suction pipes (p. 132, Req. 16). We submit that these facts are sufficient to support a claim of easement for drainage purposes only and do not evidence an intention to invest the District with greater rights.

Unlike fee ownership of land, which is a complete "bundle" of rights, an easement is *a privilege of doing a certain class of act upon the land of another.* 3 Tiffany, *Real Property* (3rd Ed. 1939) 200-201. An ease-

ment being confined to the terms of the original grant of easement, 17 Am. Jur. 996, 1002; 28 C.J.S. 751, it is believed that the District Court correctly held that none existed in favor of the District, and, consequently, the Petitioner, to construct, have or maintain suction pipes upon the land of Respondent.

B. If the Easement was General in its Terms, Then the Long Continued Use of the Same For Drainage Purposes Only Defined the Original Grant to a Grant for Drainage Purposes Only.

Petitioner, incorrectly in our opinion, has challenged solely the determination of the District Court and Court of Appeals that the grant of easement in favor of the District was specific in its terms, and that it did not include the right to construct, have or maintain a suction pipe upon the land of Respondent. Assuming for purposes of argument that Petitioner's contention is accurate that a general and not a specific grant of easement existed, then Petitioner is defeated in his assertion that such easement included the right to construct and maintain suction pipes. This contention is refuted by the facts and by his own statement of authority. In his brief (p. 5) Petitioner seeks support of the generally accepted rule of law as follows:

> "It is also settled that where a grant of an easement is general as to the extent of the burden imposed upon the servient tenement, and exercise of the right, with the acquiesence and consent of both parties, in a particular course or manner, fixed the right and limits it to the particular course or manner in which it has been enjoyed."

As a corollary to this rule, it is generally agreed that where no definite description of the easement is given in the grant, that the Grantee does not thereby

acquire a right to use the servient estate without limitation.

> "When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee."

Winslow v. *City of Vallejo*, 148 Cal. 723, 84 p. 191, 5 L.R.A. N.S. 851, 113 Am. St. Rep. 349 (1906); *City of Lynchburg* v. *Smith*, 166 Va. 364, 186 S.E. 51 (1936); *Kesseler* v. *Bowditch*, 223 *Mass.* 265, 111 N. E. 887 (1916).

Accordingly, assuming the grant of easement to the District to be a general one, the District *would have* acquired a right to use the drainage right of way for the purpose of constructing and maintaining suction pipes *only* if they had undertaken to *use* the right of way for that purpose. It was stipulated, however, (p. 123, Req. 16), as stated by the Court of Appeals, that:

> "The District never . . . maintained a suction pipe anywhere along its alleged right of way, and the only machinery used by it on the right of way was a drag line used to maintain and repair the drainage ditch."

Accordingly, if the grant of easement was general, as claimed by Petitioner, the use of the easement by the District solely for drainage purposes precluded the District from subsequently claiming an easement to have and maintain suction pipes for irrigation purposes. The long continued use of the easement for drainage purposes defined the grant of easement to one for drainage purposes only, and this easement may not now be enlarged and extended to include additional rights at the mere whim of the grantee or the Petitioner.